UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VSION TECHNOLOGIES INC., 507 Denali Pass, Ste. 602 Cedar Park, Tx 78613 Plaintiff, v. L. Francis Cissna, Director, United States Citizenship and Immigration Services, 20 Massachusetts Avenue, NW, Washington, D.C. 20529, Defendant.	C/A No.: 1:19-cv-875

COMPLAINT

As part of its 2017 Buy American, Hire American policy, the Defendant seeks to eliminate information technology consulting companies that utilize foreign labor under 8 U.S.C. § 1101(a)(15)(H). Its strategy to do so is simple. Through informal adjudications (and significant delays thereof), USCIS is creating new rules, ignoring evidence, and acting beyond its competence to deny all such petitions. For the reasons below, this Court should set aside the visa denial in this case and order the Defendant to re-adjudicate the petition in compliance with the law within 15 calendar days.

PARTIES

1. Plaintiff VSION TECHNOLOGIES INC., ("Plaintiff") is a limited liability company, organized under the laws of Texas and it is headquartered in Cedar Park, Texas. Plaintiff is an information technology consulting company that provides information technology services to its clients from its headquarters or by placing its employees at the client's location.

2. Defendant L. Francis Cissna is the Director of United States Citizenship and Immigration Services. He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H). Director Cissna and United States Citizenship and Immigration Services ("USCIS") are headquartered and "reside" in the District of Columbia.

VENUE AND JURISDICTION

3. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

4. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA"). Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

5. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

6. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because USCIS resides in the District of Columbia.

7. No statute or regulation requires an administrative appeal in this case. Thus, Plaintiff has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

8. USCIS's denial of Plaintiff's Form I129, Petition for Nonimmigrant Worker is a final agency action.

FACTS

H1B Visa Program

9. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

10. Generally, specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

11. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa").

12. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

13. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

14. The employer then signs the approved Labor Condition Application and agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the Labor Condition Application is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

15. After receiving an approved Labor Condition Application and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

16. USCIS's then reviews the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

17. Upon approval of the H1B Visa application, the employee may work for up to three years for the petitioning employer in the particular specialty occupation. 8 U.S.C. § 1184(g).

H1B Eligibility Criteria

18. The Agency is charged with determining only whether a proffered position is a "specialty occupation."

19. Congress defined "specialty occupation" as a position that requires a certain level of education or experience:

> (1) . . . the term "specialty occupation" means an occupation that requires—
>
> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

20. The Agency has further interpreted these requirements in its regulations:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or

> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

21. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

22. To determine whether a position is indeed a specialty occupation, the Agency often refers to the United States Department of Labor's Occupation Outlook Handbook ("OOH").

23. The Department of Labor regularly updates and supplements the OOH with ongoing surveys of each occupation's worker population and occupation experts. *See* https://www.onetonline.org/help/onet/ (accessed March 26, 2019). The Department of Labor considers the O*NET program to be "the nation's primary source of occupational information." *Id*.

One-Degree Rule

24. In addition to these statutes and regulations, the Agency has created a One-Degree Rule.

25. Under the One-Degree Rule, the Agency refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the proffered position does not require one specific degree.

26. In other words, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it requires one *specific* degree.

27. Various courts have identified this rule and rejected it:

> [The Agency's] implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that

> requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.

Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs., 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

28. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

29. The One-Degree Rule is *ultra vires* and arbitrary and capricious. It is further entitled to no deference.

Most, But Not All Rule

30. Similarly, the Agency has created a Most, But Not All Rule.

31. The Agency considers the OOH authoritative and dispositive.

32. The OOH separates occupations into five separate job zones. The job zones correspond with the overall experience, job training, and education required for entry into a particular occupation. *See* Job Zone Procedures (*available at* https://www.onetcenter.org/dl_files/JobZoneProcedure.pdf (last visited March 26, 2019).

33. Relevant to specialty occupations, the OOH states that the education necessary to enter into an occupation in Job Zone Four as follows: "Most of these occupations require a four-year bachelor's degree, but some do not." *Id.* at 12.

34. The particular OOH entries on the O*Net then identify the percentages of employees in that field that have a four-year degree (and higher) versus those that do not.

35. The Agency, rather than considering the percentage of employers that require a bachelor's degree or more, seizes on the "some do not" language associated with all Job Zone Four positions and deems it binding. The Agency reasons that, because some positions do not

require college degrees or more, the proffered Job Zone Four position cannot be a specialty occupation.

36. Under the Most, But Not All Rule, the Agency refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the OOH reports that most but not all positions require a bachelor's degree or higher in a specific occupation.

37. Thus, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it is in Job Zone Five.

38. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

39. The Most, But Not All Rule is *ultra vires* and it is arbitrary and capricious.

Plaintiff's Petition and Denial for Beneficiary Mallikkarjun Vppalapati

40. Plaintiff filed an H1B Visa Application on behalf of Beneficiary Mallikarjun Vppalapati on April 2, 2018.

41. The Agency determined that Plaintiff's proffered position of a "systems engineer" did not qualify as a specialty occupation.

42. It determined that, because the OOH states that degrees such as engineering, information systems, computer science or related filed, the position did not normally require a bachelor's degree under § 214.2(h)(4)(iii)(A) under the One-Degree Rule.

43. Similarly, the Agency noted that, according to the OOH, the proffered position was in Job Zone Four. As such, the proffered position could not satisfy § 214.2(h)(4)(iii)(A) because "most but not all of the occupations within it require a bachelor's degree."

44. The OOH noted that 82% of respondents in that occupation hold bachelor's, master's, or post-baccalaureate certificates. The Agency ignored this fact.

45. The Agency also ignored important facts in the record to determine that the proffered position did not satisfy any of the other regulatory requirements.

46. USCIS determined that Plaintiff's proffered position did not satisfy any of the four regulatory requirements in § 214.2(h)(4)(iii)(A). Each individual finding is arbitrary and capricious.

47. The USCIS receipt number for such case is WAC1814150255.

48. No administrative appeal is required to challenge the denial of an H1B Visa Application.

49. This complaint followed.

FIRST CAUSE OF ACTION
(APA – Not a Specialty Occupation)

50. Plaintiff re-alleges all allegations above as though restated here.

51. USCIS's denial is a final agency action that aggrieved Plaintiff. 5 U.S.C. § 704.

52. USCIS's denial is based in part on its determination that Plaintiff's proffered position is not a "specialty occupation" for various reasons

53. USCIS's determination that the Plaintiff's proffered position is not a "specialty occupation" is arbitrary and capricious.

54. A final agency action is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

55. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the One Degree Rule, which is *ultra vires*, unlawful, and arbitrary and capricious.

56. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the Most, But Not All Rule, which is *ultra vires*, unlawful, and arbitrary capricious.

57. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it lacks reasoned decisionmaking as vast swaths of the analysis are indecipherable.

58. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it considered factors Congress did not intend USCIS to consider.

59. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it entirely failed to consider an important aspect of the problem.

60. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because its rationale runs counter to the evidence in the record.

61. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is so implausible it cannot be the result of Agency expertise.

62. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it relies on a legislative rule that did not go through notice and comment rulemaking and, therefore, the denial is without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

63. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

64. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, declare Plaintiff's proffered position as a specialty occupation, instruct it to re-adjudicate the H1B Visa application without applying the Specific, Non-Speculative Work Rule.

PRAYER FOR RELIEF

Plaintiff, therefore, prays that this Court enter the following relief:

65. Take jurisdiction over this case;

66. Declare USCIS's One Degree Rule unlawful or arbitrary and capricious;

67. Declare USCIS's Most, But Not All Rule unlawful or arbitrary and capricious;

68. Declare USCIS's denials in this case violative of the Administrative Procedure Act;

69. Remand this case to USCIS with instructions to re-adjudicate the case in compliance with the above declarations within 15 calendar days;

70. Grant all relief that is necessary and proper; and

71. Award attorneys' fees and costs under the Equal Access to Justice Act.

March 27, 2019

Respectfully Submitted,

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